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In the Supreme Court of the United States

ARMOND RUSS, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE KENTUCKY DEPARTMENT FOR FACILITIES MANAGEMENT,
Petitioner,

v.

RABBI JONATHAN ADLAND, ET AL.,
Respondents.

On Petition for Writ of Certiorari
United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, INDIANA, MISSISSIPPI, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Establishment Clause prohibits government from displaying the Ten Commandments, in a context replete with secular and historical monuments, to acknowledge the Commandments' historical role in American culture and law.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Index of Authorities iii

Interest of Amici 1

Summary of the Argument 2

Argument 3

I. The Permissibility of Government Displays of the Ten Commandments Raises a Question of National Importance 3

II. There is a Significant Split in the Courts of Appeals as to Whether Ten Commandments Displays Violate the Establishment Clause 6

III. The Court Should Clarify and Reaffirm the Extent to Which Government May Legitimately Acknowledge Religion's Role as a Foundational Aspect of Our Nation's Laws and Heritage 12

IV. This Case Is a Proper Vehicle for the Court to Consider the Establishment Clause Questions 16

Prayer 17

INDEX OF AUTHORITIES

Cases

ACLU Neb. Found. v. City of Plattsmouth, 186 F.Supp.2d 1024 (D. Neb. 2002) 4, 7

Adland v. Russ, 307 F.3d 471 (CA6 2002) 6-11

Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook, 211 F.Supp.2d 873 (N.D. Ohio 2002) 4, 7

Am. Civil Liberties Union of Tenn. v. Hamilton County, 202 F.Supp.2d 757 (E.D. Tenn. 2002) 4

Am. Civil Liberties Union of Tenn. v. Rutherford County, 209 F.Supp.2d 799 (M.D. Tenn. 2002) 4

Am. Civil Liberties Union v. McCreary County, Ky., 145 F.Supp.2d 845 (E.D. Ky. 2001) 4, 7

Am. Civil Liberties Union v. Mercer County, 240 F.Supp.2d 623 (E.D. Ky. 2003) 4, 6-7

Am. Civil Liberties Union v. Pulaski County, Ky., 96 F.Supp.2d 691 (E.D. Ky. 2000) 4

Anderson v. Salt Lake City Corp., 475 F.2d 29 (CA10 1973) 6-12

Books v. City of Elkhart, 235 F.3d 292 (CA7 2000), *cert. denied*, 121 S.Ct. 2209 (2001) 3, 6-12

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 9

Christian v. City of Grand Junction, No. 01-CV-685, 2001 WL 34047958 (D. Colo. June 27, 2001) 4, 6

Colorado v. Freedom From Religion Found., 898 P.2d 1013 (Colo. 1995) 6-12

Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) 12

County of Allegheny v. ACLU, 492 U.S. 573 (1989) . 8, 9, 13, 16

Doe v. Harlan County Sch. Dist., 96 F.Supp.2d 667 (E.D. Ky. 2000) 4

Edwards v. Aguillard, 482 U.S. 578 (1987) 10

Epperson v. Arkansas, 393 U.S. 97 (1968) 12

Everson v. Board of Educ., 330 U.S. 1 (1946) 12

Freethought Society v. Chester County, 191 F.Supp.2d 589 (E.D. Pa. 2002) 4

Glassroth v. Moore, 229 F.Supp.2d 1290 (M.D. Ala. 2002) ... 4

Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766 (CA7 2001) 6-8, 11, 12, 17

Kimbley v. Lawrence County, Ind., 119 F.Supp.2d 856 (S.D. Ind. 2000) 4

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 8

Lemon v. Kurtzman, 403 U.S. 602 (1971) 2, 8, 9, 13

Lynch v. Donnelly, 465 U.S. 668 (1984) 8, 9, 13, 14, 16

Marsh v. Chambers, 463 U.S. 783 (1983) 14, 16

Newdow v. U.S. Congress, 2003 WL 554742, __ F.3d __ (CA9 Feb. 28, 2003) 15

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 16

Sch. Dist. of Abington Tp. v. Schempp, 374 U.S. 203 (1963) 12, 13

Stone v. Graham, 449 U.S. 39 (1980) 10, 11, 17

Suhre v. Haywood County, N.C., 55 F.Supp.2d 384 (W.D. N.C. 1999) 7

Summum v. Callaghan, 130 F.3d 906 (CA10 1997) 10

Van Orden v. Perry, No. A-02-CA-833-H (W.D. Tex. October 2, 2002) 4, 6

Wallace v. Jaffree, 472 U.S. 38 (1985) 8, 12

Zorach v. Clauson, 343 U.S. 306 (1952) 12, 13

Statutes and Rules

Ind. Code §36-1-16-2 (West Supp. 2001) 3

Ind. Code §4-20.5-21-2 (West Supp. 2001) 3

Ky. Rev. Stat. §158.195 (Michie 2001) 3

N.C. Gen. Stat. §115C-81(g)(3b) (1999) 3

N.M. Stat. §§22-15-15 to 22-15-20 (Michie 2001) 3

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Other Authorities

Display the Ten Commandments: An Important Step in Promoting Morality, Christian Law Association, *available at* http://www.christianlaw.org/display_ 10c.html 5

John Elvin, INSIGHT MAG., June 7, 1999, at 34, *available at* 1999 WL 8673936 5

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Joe Garner, *ACLU Sues Over Commandments*, MILWAUKEE J. SENTINEL, May 6, 2001, at 12A, *available at* 2001 WL 9354431 5

John Hostettler, *The Church/State Separation Fallacy*, (Aug. 1, 2001), *available at* 2001 WL 5421955 5

Joshua Hammann, *ACLU Sues State to Stop Ten Commandments at Capitol*, ASSOCIATED PRESS, July 11, 2000, *available at* WESTLAW, ALLNEWSPLUS database, 7/11/00 APWIRES 02:00:00 5

Robert E. Meyer, *Some Misunderstand First Amendment*, MILWAUKEE J. SENTINEL, Aug. 11, 2001, at 14A, *available at* 2001 WL 9372349 5

Rob Schmitz, *The Ten Commandments: Religious or Historical Symbol?* (Minnesota Public Radio broadcast, Sept 10, 2001), *available at* http://news.mpr.org/features/200109/10_scmitzr_laxten-m/index.shtml 5

LOUIS TORRES, "TO THE IMMORTAL NAME AND MEMORY OF GEORGE WASHINGTON": THE UNITED STATES ARMY CORPS OF ENGINEERS AND THE CONSTRUCTION OF THE WASHINGTON MONUMENT 82–84 (U.S. Gov't Printing Office, 1985) 15

State Legislative Update for the 2001 Sessions, *at* http://www.au.org/states.htm (March 12, 2003) 3

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BRIEF OF THE STATES OF TEXAS, ALABAMA, INDIANA, MISSISSIPPI, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI

Over time, Texas and many other States have chosen to erect monuments displaying the Ten Commandments as foundational to the development of our system of laws. The recognition of the importance of the Ten Commandments to the development of the rule of law and to the availability of equal justice under law is widespread, by the federal government, the state governments, local governments, and by the people.

In recent years, these state and local monuments have been subjected to consistent and frequent legal attack in an effort to

remove them and to prevent any future construction. The result of this campaign is that States now face conflicting federal-and state-court decisions on whether and when such monuments are constitutional, and, more broadly, on just how far governments may go in acknowledging religion as a part of our national heritage through displays on public property that include both religious and nonreligious symbols.

Through this case, the Court has the opportunity to provide state and local government officials much-needed guidance and clarification in this specific area of the law as well as in the wider context of Establishment Clause jurisprudence.

SUMMARY OF THE ARGUMENT

For many decades, States and local governments have chosen to acknowledge and memorialize the historical and cultural contributions of the Ten Commandments to the development of western legal codes. Today, there is a significant and growing split of authority among the courts of appeals and state courts regarding the constitutionality of these government displays of the Ten Commandments. Not only have those courts come to opposite constitutional conclusions regarding *virtually identical displays*, but they have also differed starkly in their analysis of almost every aspect of the test laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The importance of this issue is amply demonstrated by widespread decisions of States, local governments, and even the federal government to display the Ten Commandments, and by the corresponding determination of opponents of such displays to bring litigation to stop them. This Court should grant certiorari to resolve the growing conflict among the lower courts and to reaffirm that government may legitimately recognize the role of religion as a foundational aspect of our nation's law and culture.

ARGUMENT

I. THE PERMISSIBILITY OF GOVERNMENT DISPLAYS OF THE TEN COMMANDMENTS RAISES A QUESTION OF NATIONAL IMPORTANCE.

Hundreds of Ten Commandment monuments are displayed on government property across the country. *See Books v. City of Elkhart*, 235 F.3d 292, 294-95 (CA7 2000) (noting that local chapters of the Fraternal Order of Eagles donated Ten Commandments monuments to States and political subdivisions across the country), *cert. denied*, 121 S.Ct. 2209 (2001). And the government interest in displaying the Ten Commandments only continues to grow. At least five States have enacted laws authorizing the display of the Ten Commandments on public grounds or in public schools. *See* Ind. Code §§4-20.5-21-2 (West Supp. 2001) and 36-1-16-2 (West Supp. 2001); Ky. Rev. Stat. §158.195 (Michie 2001); N.M. Stat. §§22-15-15 to 22-15-20 (Michie 2001); N.C. Gen. Stat. §115C-81(g)(3b) (1999); S.D. Codified Laws §13-24-17.1 (Michie Supp. 2001). Moreover, in the last three years, legislatures in at least nine other States considered bills to permit or require the display of the Ten Commandments on government property or in public schools. *See* State Legislative Update for the 2001 Sessions, *at* http://www.au.org/states.htm (March 12, 2003).

The federal government, as well, deems it important to commemorate the importance of the Ten Commandments in the development of the rule of law. For example, every visitor entering the National Archives building to view the original Constitution and Declaration of Independence must first pass under the Ten Commandments embedded in the entryway to the Archives. *See* http://wallbuilders.com/resources/search/detail.php?ResourceID=41 (last visited March 19, 2003). And, of course, Justices of this Court need only look over their left shoulders from the bench to see

Moses holding the Ten Commandments and looking down upon them.

Yet these widespread public acknowledgments of the important role of the Ten Commandments have, in recent years, become the subject of an increasing series of litigation attacks.[1] Over the past few years, there has been persistent and pervasive litigation seeking to remove such displays or to prevent their future construction. *See, e.g., Am. Civil Liberties Union v. Mercer County*, 240 F.Supp.2d 623 (E.D. Ky. 2003); *Van Orden v. Perry*, No. A-02-CA-833-H (W.D. Tex. October 2, 2002); *Glassroth v. Moore*, 229 F.Supp.2d 1290 (M.D. Ala. 2002); *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 211 F.Supp.2d 873 (N.D. Ohio 2002); *Am. Civil Liberties Union of Tenn. v. Hamilton County*, 202 F.Supp.2d 757 (E.D. Tenn. 2002); *Freethought Society v. Chester County*, 191 F.Supp.2d 589 (E.D. Pa. 2002); *ACLU Neb. Found. v. City of Plattsmouth*, 186 F.Supp.2d 1024 (D. Neb. 2002); *Am. Civil Liberties Union of Tenn. v. Rutherford County*, 209 F.Supp.2d 799 (M.D. Tenn. 2002); *Am. Civil Liberties Union v. McCreary County, Ky.*, 145 F.Supp.2d 845 (E.D. Ky. 2001); *Christian v. City of Grand Junction*, No. 01-CV-685, 2001 WL 34047958 (D. Colo. June 27, 2001); *Doe v. Harlan County Sch. Dist.*, 96 F.Supp.2d 667 (E.D. Ky. 2000); *Am. Civil Liberties Union v. Pulaski County, Ky.*, 96 F.Supp.2d 691 (E.D. Ky. 2000); *Kimbley v. Lawrence County, Ind.*, 119 F.Supp.2d 856 (S.D. Ind. 2000).

These litigation campaigns have thrust the status of state and local monuments into substantial legal uncertainty and have sparked

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[1] *See generally* Freedom from Religion Foundation, *Action Alert* (Sept. 5, 2001), *at* http://www.ffrf.org/action/10comm.html (last visited Mar. 20, 2003) (Internet web site urging persons to protest Ten Commandment monuments on state property in Alabama, Arizona, and Texas).

growing public debates about the permissibility of recognizing the Ten Commandments publically.[2]

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[2] "What some see as a legal violation, others view as a symbol of our nation's roots." Rob Schmitz, *The Ten Commandments: Religious or Historical Symbol?* (Minnesota Public Radio broadcast, Sept. 10, 2001), *available at* http://news.mpr.org/features/200109/10_scmitzr_laxten-m/index.shtml. Opponents complain that a monument displaying the Ten Commandments "sends the message that people who adhere to its principles 'are the inside, favored group' . . . and people with other beliefs are outsiders." Joe Garner, *ACLU Sues Over Commandments*, MILWAUKEE J. SENTINEL, May 6, 2001, at 12A, *available at* 2001 WL 9354431. They see the display as a "thinly disguised attempt[] to use government to promote religion" and send a "distinctly Judeo-Christian message." *See* Joshua Hammann, *ACLU Sues State to Stop Ten Commandments at Capitol*, ASSOCIATED PRESS, July 11, 2000, *available at* WESTLAW, ALLNEWSPLUS database, 7/11/00 APWIRES 02:00:00.

On the other hand, supporters may see efforts to remove or block the erection of such monuments as "part of a systematic campaign . . . to denigrate God . . . in public life" and as "attempts to deconstruct the American way of life." *See id.*; John Elvin, INSIGHT MAG., June 7, 1999, at 34, *available at* 1999 WL 8673936. They view such monuments as a simple "acknowledg[ment] of their religious heritage," Robert E. Meyer, *Some Misunderstand First Amendment*, MILWAUKEE J. SENTINEL, Aug. 11, 2001, at 14A, *available at* 2001 WL 9372349, and as a recognition of the roots of the American justice system. John Hostettler, *The Church/State Separation Fallacy*, (Aug. 1, 2001), *available at* 2001 WL 5421955. Supporters argue that "the Ten Commandments are as much civic and historic treasures as they are religious," and that the Decalogue is "a code of moral conduct that promotes respect for our system of laws and the good of society." *Display the Ten Commandments: An Important Step in Promoting Morality*, Christian Law Association, *available at* http://www.christianlaw.org/display_ 10c.html.

II. THERE IS A SIGNIFICANT SPLIT IN THE COURTS OF APPEALS AS TO WHETHER TEN COMMANDMENTS DISPLAYS VIOLATE THE ESTABLISHMENT CLAUSE.

There is a growing split among the courts of appeals regarding the constitutionality of Ten Commandments monuments. The Sixth and Seventh Circuits have held that such monuments violate the Establishment Clause. *See Adland v. Russ*, 307 F.3d 471 (CA6 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (CA7 2001); *Books*, 235 F.3d 292. The Tenth Circuit, on the other hand, joined by the Colorado Supreme Court, has held similar monuments constitutional. *See Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (CA10 1973); *Colorado v. Freedom From Religion Found.*, 898 P.2d 1013 (Colo. 1995).

The split is clear,[3] wide,[4] and deep.[5] The starkness of the split

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[3] Its clarity is evident from the express disagreement among the courts of appeals and from the utterly parallel factual scenarios considered by each. *See* discussion *infra*.

[4] Its width is evident from the fact that the disagreement is not merely over a narrow point of law. The courts diverge over virtually every aspect of the Establishment Clause analysis concerning Ten Commandments monuments. *See* discussion *infra*.

[5] Its depth is evident from the fact that there are three court of appeals decisions on one side of the split (the Sixth Circuit and the Seventh Circuit, twice) and two on the other (the Tenth Circuit and the Colorado Supreme Court). And, there is even greater disagreement among the district courts. *Compare Van Orden v. Perry*, No. A-02-CA-833-H (W.D. Tex. October 2, 2002) (holding that display of Eagles' Ten Commandments monument on Texas Capitol grounds did not violate Establishment Clause); *Christian v. City of Grand Junction*, No. 01-CV-685, 2001 WL 34047958 (D. Colo. June 27, 2001) (holding that display of Eagles' Ten Commandments monument at city hall did not violate Establishment Clause); *Am. Civil Liberties Union v. Mercer County*, 240

in the courts of appeals is further highlighted by the fact that, with the exception of one, all of the monuments in question were *virtually identical*—each had been donated by the Fraternal Order of Eagles during the 1950s and 1960s. *See Adland*, 307 F.3d, at 475; *Books*, 235 F.3d, at 296; *Colorado*, 898 P.2d, at 1016-17; *Anderson*, 475 F.2d, at 30. The Indiana statehouse monument at issue in *O'Bannon* was similar, but actually had replaced the original Eagles plaque, which had been destroyed earlier by vandals. *See* 259 F.3d, at 768. All of the monuments contained virtually identical Ten Commandments text, although the monument in *O'Bannon* also included the text of the Bill of Rights of the United States Constitution and the text of the Preamble to the 1851 Indiana Constitution. *See Adland*, 307 F.3d, at 475; *O'Bannon*, 259 F.3d, at 768-69; *Books*, 235 F.3d, at 296; *Colorado*, 898 P.2d, at 1016.

And all of the monuments save Indiana's also contained similar symbols, including small tablets containing ancient Hebrew script, the Star of David, a pyramid containing an all-seeing eye, letters of the Greek alphabet superimposed upon one another and thought to signify Christ, an eagle grasping the United States flag, and a scroll

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F.Supp.2d 623 (E.D. Ky. 2003) (holding that display of Ten Commandments in county courtroom did not violate Establishment Clause); *and Suhre v. Haywood County, N.C.*, 55 F.Supp.2d 384 (W.D. N.C. 1999) (same) *with ACLU Neb. Found. v. City of Plattsmouth*, 186 F.Supp.2d 1024 (D. Neb. 2002) (holding that display of Eagles' Ten Commandments monument in city park violated Establishment Clause); *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 211 F.Supp.2d 873 (N.D. Ohio 2002) (holding that county judge's display in courtroom of Ten Commandments poster along with Bill of Rights poster violated Establishment Clause); *and Am. Civil Liberties Union v. McCreary County, Ky.* 145 F.Supp.2d 845 (E.D. Ky. 2001) (holding that counties' and school districts' display of Ten Commandments with other historical documents violated Establishment Clause).

stating that the monument was donated by the Eagles. *See Adland*, 307 F.3d, at 476; *Books*, 235 F.3d, at 296; *Colorado*, 898 P.2d, at 1016; *Anderson*, 475 F.2d, at 30. Four of the monuments were located—or planned to be located—among other monuments on the grounds of the seat of government of either a state or a city. *See Adland*, 307 F.3d, at 474-75 (Kentucky Capitol grounds); *O'Bannon*, 259 F.3d, at 769 (Indiana Capitol grounds); *Books*, 235 F.3d, at 294 (City of Elkhart municipal building); *Colorado*, 898 P.2d, at 1014 (Colorado Capitol grounds). The remaining monument was situated at the Salt Lake City-County Courthouse. *See Anderson*, 475 F.2d, at 30.

These varying constitutional results, regarding virtually identical monuments in virtually identical locations, were reached after ostensibly applying the very same legal framework—that never-dying "late-night" "ghoul," the *Lemon* test. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment); *see also Lemon*, 403 U.S., at 612–13.

By its terms, the first two prongs of the *Lemon* test ask (1) whether the challenged state action has a secular purpose, and (2) whether the primary effect of the state action advances or inhibits religion. *Id.*, at 612. The Court has subsequently distilled *Lemon*'s first two prongs to mean that government may take no action that has the purpose or effect of endorsing or disapproving religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 600–01 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).[6]

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[6] Under this Court's precedents, a government display has the purpose of endorsing religion if it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S., at 593; *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment). In determining whether a government display has the effect of endorsing religion, the

The courts of appeals disagree on the application of virtually every facet of the *Lemon* test to these monuments. As an initial matter, they diverge regarding the character of the text of the Ten Commandments themselves. The Seventh Circuit found the Decalogue to be "inherently religious" text that cannot "be stripped of [its] religious, indeed sacred, significance and characterized as a moral or ethical document." *Books*, 235 F.3d, at 302. This conflicts with the Tenth Circuit's view of the Ten Commandments as "at once religious and secular" and as having "substantial secular attributes," *Anderson*, 475 F.2d, at 33, and with the Colorado Supreme Court's opinion that the Decalogue represents secular history and natural law, *Colorado*, 898 P.2d, at 1024.

The courts of appeals also differ regarding the effect of the symbols that accompany the text on the face of the monuments. The Seventh Circuit held that the presence of Christian and Hebrew text constituted an endorsement of religion. *See Books*, 235 F.3d, at 307. That court similarly held that the eagle grasping the American flag signified endorsement by "specifically link[ing] religion . . . and civil government." *Id.* The Sixth Circuit agreed with this analysis, holding that the "combination of revered secular symbols like the American flag and the Ten Commandment [sic] serves to link government and religion in an impermissible fashion." *Adland*, 307 F.3d, at 486-87.

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question is "what viewers may fairly understand to be the purpose of the display." *Allegheny*, 492 U.S., at 595; *Lynch*, 465 U.S., at 692 (O'Connor, J., concurring). And that question is evaluated by the objective standard of the reasonable observer, deemed to be informed of the history and context of the display in question. *Allegheny*, 492 U.S., at 620; *id.*, at 631 (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment).

This reasoning conflicts with *Colorado*, in which the court held that the same symbols did not endorse religion because their largely secular character negated any message of endorsement. *See* 898 P.2d at 1023-24. "We find that the juxtaposition of the Christian Chi and Rho with the Jewish Star of David reflects an acknowledgment of reconciliation and diversity more than any sentiment of intolerance." *Id.*, at 1023. The court also found that the all-seeing eye had both secular and religious meanings, and thus conveyed no message of religious endorsement. *See id.*, at 1023-24. Finally, unlike the Sixth and Seventh Circuits, the Colorado court concluded that the eagle and American flag were "patriotic symbols" that likewise expressed no endorsement of religion. *See id.*, at 1024.

The courts also disagree over the underlying purpose of erecting Ten Commandments monuments. The Sixth and Seventh Circuits relied principally on this Court's decision in *Stone v. Graham*, 449 U.S. 39 (1980)—which concerned the constitutionality of mandating the posting of the Ten Commandments in the coercive context of public schoolchildren subject to compulsory attendance. Notwithstanding *Edwards v. Aguillard*'s admonition that courts should be "normally deferential to a State's articulation of a secular purpose," absent a "sham," 482 U.S. 578, 586-87 (1987), both circuits read *Stone* as "compell[ing]" a rejection of the State's proffered secular purposes, *Adland*, 307 F.3d, at 481; *see also Books*, 235 F.3d, at 302-04. In contrast, *Anderson*[7] and *Colorado*

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[7] To be sure, the fact that *Anderson* was decided before *Stone* has provided a basis for a Tenth Circuit panel, in a footnote dictum, to question its reasoning. *See Summum v. Callaghan*, 130 F.3d 906, 913 n.8 (CA10 1997). But *Summum* did not overrule *Anderson*, *id.*, and neither did *Stone* (indeed, the *Stone* majority did not even mention *Anderson*, despite the dissent's reliance on the case, *see* 449 U.S. at 196 (Rehnquist, J., dissenting)). And *Anderson* was in a far different context—not in a

both found ample secular purposes in erecting the virtually identical monuments, given the Ten Commandments' "substantial secular attributes," 475 F.2d, at 33, "expressions of universal standards of behavior common to all western societies," and "large role in the development of the common law and . . . national constitution," 898 P.2d, at 1024.

Finally, the courts diverge on whether the overall secular context of the monuments contributes to or detracts from any message of religious endorsement. The Sixth Circuit held that the secular monuments and displays that were to surround the Ten Commandments monument in the Kentucky Capitol garden area were essentially of neutral effect, neither enhancing nor diminishing the religious endorsement the court found to emanate from the monument. *See Adland*, 307 F.3d, at 487-88. The Seventh Circuit, on the other hand, held that the secular context of the Indiana monument amplified the Ten Commandments' religious message. It found that the juxtaposition of the Bill of Rights and the Preamble to the Indiana Constitution alongside the text of the Ten Commandments "impermissibly linked" religion and government, resulting in an improper religious endorsement. *See O'Bannon*, 259 F.3d, at 773. Similarly, in *Books*, the Seventh Circuit concluded that the secular monuments surrounding the City of Elkhart's Ten Commandments monument augmented the religious nature of the Decalogue. *See* 235 F.3d, at 306.

In contrast, the *Colorado* court held that the context of Colorado's Ten Commandments monument communicated secular history and thus neutralized the Ten Commandments' religious character. "The various monuments found around the park in fact represent a cornucopia of different cultural events and experiences

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potentially coercive schoolroom setting—than *Stone*, as *Colorado* compellingly reasoned. 898 P.2d, at 1022-23.

that make up the history of our nation and reflect upon a history that is also Colorado." *Colorado*, 898 P.2d, at 1025. That conclusion is squarely inconsistent with the Seventh Circuit's view that secular surroundings constitute an "impermissible link" between religion and government that somehow enhances religious endorsement.

The decision below and the decisions in *Books* and *O'Bannon* fundamentally conflict with the decisions in *Anderson* and *Colorado*. The Court should grant certiorari to resolve this conflict.

III. THE COURT SHOULD CLARIFY AND REAFFIRM THE EXTENT TO WHICH GOVERNMENT MAY LEGITIMATELY ACKNOWLEDGE RELIGION'S ROLE AS A FOUNDATIONAL ASPECT OF OUR NATION'S LAWS AND HERITAGE.

"[I]t has never been thought either possible or desirable to enforce a regime of total separation [between religion and government]." *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 760 (1973). The overarching principle animating the Establishment Clause is government neutrality towards religion. *See Wallace*, 472 U.S., at 60. That is, government cannot favor religion over nonreligion, and it cannot favor one religion over another. *See Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 226 (1963). At the same time, government cannot "show a callous indifference to religious groups" because "[t]hat would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *see also Everson v. Board of Educ.*, 330 U.S. 1, 18 (1946) (stating that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary"). As Justice Goldberg wrote in *Abington*,

> "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the

> religious which the Constitution commands, but of brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings Government must inevitably take cognizance of the existence of religion." 374 U.S., at 306 (Goldberg, J., concurring).

The Court has also recognized that complete separation between government and religion "'is not possible in an absolute sense'" and that "'[s]ome relationship between government and religious organizations is inevitable.'" *Lynch*, 465 U.S., at 672 (quoting *Lemon*, 403 U.S., at 614). "Nor does the Constitution require complete separation of church and state; it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility towards any." *Id.*, at 673 (emphasis added); *see also Allegheny*, 492 U.S., at 657 (Kennedy, J., concurring in the judgment and dissenting in part) ("Government policies of accommodation, acknowledgment, and support of religion are an accepted part of our political and cultural heritage."). The Establishment Clause is elastic enough to "permit[] government some latitude in recognizing and accommodating the central role religion plays in our society." *Allegheny*, 492 U.S., at 657 (Kennedy, J., concurring in judgment and dissenting in part). Through accommodation, government shows "respect to the religious nature of our people." *Zorach*, 343 U.S., at 314.

Accordingly, this Court has consistently upheld the constitutionality of recognizing the impact and significance of religion on American culture and society. For example, the Court has acknowledged that its own court proceedings open with an

announcement concluding, "God save the United States and this Honorable Court." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). Similarly, in *Lynch*, the Court noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including official Thanksgiving and Christmas holidays, House and Senate chaplains, the national motto "In God We Trust," the Pledge of Allegiance, religious paintings in the National Gallery, *Moses holding the Ten Commandments* on the frieze of this Court, and regular presidential proclamations for a National Day of Prayer.[8] 465 U.S., at 673-77. As Justice O'Connor explained, "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*, at 693 (O'Connor, J., concurring).

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[8] The extent to which expressly religious acknowledgments have been deemed acceptable by this Court is well illustrated by the text of President Roosevelt's 1944 Proclamation of Thanksgiving, quoted at length by the Court in *Lynch*:

> "'[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other lands. . . .To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas.'" 465 U.S., at 675 n.3 (quoting Proclamation No. 2629, 9 Fed.Reg. 13,099 (1944) and citing similar proclamations by six Presidents since (Proclamation No. 5098, 48 Fed.Reg. 42,801 (1983); Proclamation No. 4803, 45 Fed.Reg. 75,633 (1980); Proclamation No. 4333, 39 Fed.Reg. 40,003 (1974); Proclamation No. 4093, 36 Fed.Reg. 21,401 (1971); Proclamation No. 3752, 31 Fed.Reg. 13,635 (1966); Proclamation No. 3560, 28 Fed.Reg. 11,871 (1963)).

To ignore the "history and ubiquity" of religion,[9] and of the recognition of the Ten Commandments in particular, is to, in effect, "adopt[] a stilted indifference to our past and present realities as a predominantly religious people," as Judge O'Scannlain noted in dissent in another recent case striking down a longstanding religious and cultural acknowledgment in public life. *Newdow v. U.S. Congress*, 2003 WL 554742, __ F.3d __ (CA9 Feb. 28, 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc).[10]

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[9] Indeed, the very apex of the Washington Monument is inscribed with the Latin phrase Laus Deo—"Praise be to God"—on the aluminum tip of its capstone. LOUIS TORRES, "TO THE IMMORTAL NAME AND MEMORY OF GEORGE WASHINGTON": THE UNITED STATES ARMY CORPS OF ENGINEERS AND THE CONSTRUCTION OF THE WASHINGTON MONUMENT 82–84 (U.S. Gov't Printing Office, 1985).

[10] As Judge Fernandez noted in the same case, public recognition of the role and history of religion in America establishes a religion only "in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." *Newdow*, 2003 WL 554742 at *23. (Fernandez, J., concurring and dissenting). Reading the First Amendment to eliminate religious reference ultimately operates instead to "confer[] a favored status on atheism in our public life." *Id.* at *13. (O'Scannlain, J., dissenting from denial of rehearing en banc).

With respect to the Pledge, such a reading is possible only "without reference or regard to our collective experience in the half-century .... In that time, generations of Americans have grown up reciting the Pledge, religious tolerance and diversity has flourished in this country, and we have become a beacon for other nations in this regard. As Judge Fernandez observes, 'it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.'" *Id.* (citing *id.* at n. 4 (Fernandez, J., dissenting)). The same might be said of the fifty some years since the Eagles began donating Ten Commandments monuments throughout the country.

The Constitution requires no such hostility to religion. In short, the amici States believe that between the two extremes of government endorsement of religion and government hostility against religion, there lies a broad zone in which government may recognize or acknowledge the important foundational role religion has played in our nation's laws and history. Such practices are acceptable because they are "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S., at 792. And they are constitutional because, rather than establish religion, such practices are part of "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S., at 674.

IV. This Case Is a Proper Vehicle for the Court to Consider the Establishment Clause Questions.

The presence of a dispute over ripeness does not present a vehicle problem sufficient to prevent this Court from reaching this important issue. Because this case was brought as a facial challenge to the legislative resolution authorizing Kentucky's Ten Commandments monument, the case was tried before the legislative resolution had ever actually been applied. But such is inherent with any facial challenge.

Striking down a state monument on a facial challenge, as the Sixth Circuit did here, is particularly inappropriate given this Court's consistent emphasis on the *context* of a given display. *See Allegheny*, 492 U.S., at 597. Government action should be judged "in its unique circumstances to determine whether it constitutes and endorsement or disapproval of religion." *Lynch*, 465 U.S., at 694 (O'Connor, J., concurring); *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("Our inquiry into this question [whether student-led prayer at varsity football games violates the Establishment Clause] not only can, *but must*, include an

examination of the circumstances surrounding the enactment." [emphasis added]).

Yet facial challenges are routinely brought against these sorts of monuments, and courts reach out to decide the merits. *See, e.g., O'Bannon*, 259 F.3d., at 768-69. Especially given the confusion over the meaning in non-school contexts of this Court's opinion in *Stone v. Graham*—and the degree to which that decision resolves the Ten Commandments Establishment Clause inquiry as a matter of law—facial challenges to Ten Commandment monuments can be expected to persist in the future, and courts will continue to address them.

Accordingly, this Court's guidance on when, if ever, such facial challenges are appropriate is much needed by the States and will clarify significant confusion in the circuits. Therefore, this Court should take this opportunity to articulate a clear standard as to when Ten Commandments monuments can be, and more specifically, cannot be held facially unconstitutional under the fact-specific Establishment Clause standards.

PRAYER

The petition for writ of certiorari should be granted.

Respectfully submitted,

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